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AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 597

Case No. 593: COLAYCO

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Luis de Posadas Montero, Vice-President; Mr. Hubert Thierry;

Whereas at the request of Emma J. Colayco, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 31 March 1991, the time-limit for the filing of an application to the Tribunal;

Whereas, on 28 March 1991, the Applicant filed an application requesting the Tribunal:

> "1. To rescind the recommendation of the New York General Service Classification Appeals and Review Committee (NYGSCARC) of 1 March 1990, regarding the Applicant's classification appeal and to consider erroneous the decision of 4 June 1990 of the Assistant Secretary-General for Human Resources Management;
>
> 2. To order the classification of the Applicant's post at the P-2 level, with retroactive effect as of 1 January 1985, in accordance with annex I, part IV, section B, paragraph 14 of information circular ST/IC/86/27 of 28 April 1986 (...) and to rule that the Representative of the Secretary-General did not classify the functions of the Applicant according to the nature of the duties and responsibilities required of the post;

3. To order the Respondent to treat the Applicant's case in the same manner as those cases where, as a result of the initial classification exercise, the posts were upgraded and the General Service staff members encumbering those posts were accordingly upgraded to the Professional level in accordance with ST/IC/86/27 (...);

4. To find that the NYGSCARC proceedings violated the basic Staff Regulations and Staff Rules set out in chapter XI for the Joint Appeals Boards;

5. To find that the Administration had misled the substantive department by having given no indication of the latter's opportunity to classify the post at the Professional level which, as indicated in paragraph 6 below, was the clear intention of the Department's Management;

6. To accept the letters of Senior Management (..., former Under-Secretary-General for Special Political Questions, Regional Cooperation, Decolonization and Trusteeship (SPQRCDT) (...) and ..., Deputy Director, Division for Decolonization and Trusteeship, SPQRCDT, (...); of the former supervisor of the Applicant (..., Editorial Control Officer, Department of Conference Services (...); and of the current supervisor of the Applicant (..., Chief of Editorial Unit, SPQRCDT (...) as affidavits in support of the intention of Management to have this post classified at the Professional level;

7. To find that the classification audit set out in ST/AI/301 (...) was not applied to the Applicant;

8. To declare that the violations of administrative procedures contained in Article 101 of the Charter of the United Nations, staff regulation 1.4 (Conduct of staff members), staff regulation 2.1 (Classification of posts and staff), General Assembly resolution 41/209, part IX, ST/IC/86/27 (...), ST/IC/81/21 (...), ST/IC/82/66 (...) and ST/AI/301 (...); breaches of due process; violation of the principle of good faith in dealing with staff members; and inordinate delay of several years have caused material, financial, professional and moral damages to the Applicant, for which the Respondent is required to pay compensation;

9. To award compensation for moral damages in an exemplary amount, including punitive damages of

not less than $25,000; to grant an additional $12,000 in compensation for actual losses in salary and allowances; to pay the appropriate amount for pension benefits that would have accrued had the Applicant's promotion come through when it should have;

10. To grant the Applicant's request for oral proceedings and the presentation for examination of the following witnesses, in accordance with articles 15 and 16 of the Statutes and Rules of the United Nations Administrative Tribunal:

..."

Whereas the Respondent filed his answer on 10 January 1992;

Whereas the Applicant filed written observations on 26 March 1992;

Whereas, on 30 June, 24 September and 19 October 1992, the Applicant submitted additional statements and further documents;

Whereas, on 29 October 1992, the Tribunal requested the Respondent to provide the Applicant "with the analysis by the Compensation and Classification Service referred to in each case as one of the elements considered by NYGSCARC in making its recommendations on the level of the posts" and put a further question to the Respondent;

Whereas, on the same date, the Tribunal put further questions to the Applicant and asked her "to advise the Tribunal whether there is any further information that ... she wishes to be considered, which deals exclusively with the above analysis and the nature of the duties and responsibilities of the post, as set forth in the job descriptions to which that analysis was directed";

Whereas, on 3 November 1992, the Respondent submitted to the Tribunal the documentation requested and the Applicant, on 9 November 1992, provided her comments thereon, together with replies to the questions put by the Tribunal;

Whereas, on 20 November 1992, the Executive Secretary of the Tribunal informed the parties that the Tribunal had decided to adjourn consideration of the case until its 1993 Spring session;

Whereas, on 4 May 1993, the Applicant submitted an additional document;

Whereas the facts in the case are as follows:

Emma Colayco entered the service of the United Nations on 12 December 1966, on a three month fixed-term appointment at the G-3, step I level, as a Clerk-Stenographer in the Department of Trusteeship and Non-Self-Governing Territories. On 12 March 1967, she was granted a probationary appointment and on 1 December 1968, a permanent appointment. The Applicant was promoted to the G-4 level as a Secretary, with effect from 1 April 1971. She was reassigned, with effect from 12 April 1976 and within the same department, as an Editorial Clerk, to the Secretariat Services, Editorial Unit. On 1 April 1977, the Applicant was promoted to the G-5 level as a Senior Editorial Clerk and, on 1 January 1985, to the G-6 level, as Editorial Assistant. From 16 January 1991 through 5 June 1992, the Applicant was paid a special post allowance to the P-2 level.

In July 1982, the International Civil Service Commission (ICSC) had approved the establishment of a seven-level grading structure (to replace the old five-level structure) for the General Service category in New York and promulgated job classification standards for the seven levels. As a result, all General Service posts in New York were classified under procedures set out in administrative instruction ST/AI/301 of 10 March 1983.

In accordance with the administrative instruction, a description of the post encumbered by the Applicant was prepared for initial classification and submitted to the Classification Service on 30 December 1983.

On 13 June 1984, the Assistant Secretary-General, Office of Personnel Services (OPS) announced to the staff, in information circular ST/IC/84/45, the establishment of the Classification

Review Group "to review the overall results of the classification exercise currently being undertaken in respect of posts in the General Service and related categories in New York". The Applicant's post was classified at the G-6 level.

On 28 April 1986, the Assistant Secretary-General, OPS, informed the staff, in information circular ST/IC/86/27, "of the action taken with respect to the classification exercise for posts in the General Service ... categories at United Nations Headquarters and to outline future action, in particular with respect to the implementation of the results of the exercise and the related appeals procedure." NYGSCARC was established with effect from 16 May 1986, to hear appeals against the results of the classification exercise.

In a memorandum dated 16 June 1986, the Applicant appealed the initial classification of her post, stating: "As the functions of my post were not properly described in the job description previously submitted, I attach ... a revised description which more accurately reflects the duties and responsibilities of the post."

The Assistant Secretary-General for the Office of Human Resources Management (OHRM[1]), submitted the Applicant's case to NYGSCARC for advice on the basis of information circular ST/IC/86/27 Annex II, subparagraph 10(c). However, the procedure contained in subparagraph 10(b) of the information circular, requiring review by the Classification Section, was not followed.

NYGSCARC reviewed the case and confirmed classification of the post at the G-6 level. The Assistant Secretary-General, OHRM, approved this recommendation on 21 January 1987.

In a memorandum dated 15 May 1987, to the Assistant Secretary-General, OHRM, the Applicant appealed the classification decision. She requested that the functions of the post be compared with those of an Associate Editor at the P-2 level in the same department. She stated that an examination of the two job descriptions would indicate that the functions performed were the

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[1] Successor of OPS.

same. She also attached a copy of a memorandum to the Assistant Secretary-General, OHRM, from the Officer-in-Charge of Administration, Political Affairs Trusteeship and Decolonization requesting a review of the job description with a view to upgrading the post to the P-2 level.

As the initial appeal had not been reviewed in accordance with the procedure specified in subparagraph 10(b) of Annex II of information circular ST/IC/86/27, i.e., the case was resubmitted to NYGSCARC after the procedure had been corrected.

NYGSCARC reviewed the appeal at its fourth meeting on 1 March 1990 and recommended as follows: "Based upon its review of the revised job description submitted as part of the initial appeal, the information provided by the appellant in her memoranda of appeal and its attachments, the information provided by the Officer-in-Charge of Administration, PATD, in his memorandum of 14 May 1987, the analysis provided by the Compensation and Classification Service which confirmed the initial classification decision, the Committee concluded that the functions of the post corresponded to the GS-6 level depicted in the General Service Classification Standards. Accordingly, the Committee recommends that the post be maintained at the GS-6 level in the Editorial Related occupation".

In a memorandum dated 4 June 1990, the Assistant Secretary-General, OHRM, informed the Applicant that he had approved the recommendation by NYGSCARC.

On 10 August 1990, the Applicant sought the Secretary-General's agreement to submit an appeal from the decision to classify her post at the G-6 level, directly to the Tribunal, under article 7.1 of the Tribunal's Statute. On 27 September 1990, the Secretary-General consented to the Applicant's request stating:

> "Under the circumstances of this case, the Secretary-General is of the opinion that submission of the dispute to the New York General Service Classification and Review Committee satisfies the requirement that a dispute be submitted to 'the joint appeals body' set out in article 7, paragraph 1, of the Administrative Tribunal Statute.

Alternatively, the Secretary-General would agree to the direct submission of Ms. Colayco's application to the Administrative Tribunal."

On 28 March 1991, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent erred in classifying her post at the G-6 level rather than at the P-2 level.

2. NYGSCARC proceedings violated her rights under the Staff Regulations and Rules.

3. The Respondent "misled" the Applicant's substantive Department (SPQRCDT) as to the opportunity to classify the Applicant's post at the Professional level.

4. The post the Applicant encumbered was not submitted for a job classification audit.

5. The Respondent's actions violated Article 101 of the Charter, certain Staff Regulations and General Assembly resolution 41/210, paragraph IX.

6. The Respondent failed to deal with the Applicant in good faith and there was an inordinate delay in the General Service classification exercise.

Whereas the Respondent's principal contentions are:

1. The Respondent's discretionary decision with regard to the classification level of the Applicant's post was properly taken following an independent review by a specialized appeals body.

2. In accordance with its jurisprudence, "the Tribunal cannot substitute its judgement for that of the Secretary-General in job classification matters".

3. The Applicant was not deprived of a fair hearing or any other element of due process.

4. The decision to classify the Applicant's post at a particular level is not within the authority of the Applicant's department, but is vested in the Assistant Secretary-General, OHRM.

5. The decision to classify the Applicant's post at the G-6 level was a valid exercise of the Respondent's discretionary authority.

The Tribunal, having deliberated from 7 June to 29 June 1993, now pronounces the following judgement:

I. The Applicant challenges the decision dated 4 June 1990, by the Respondent, adopting a recommendation dated 1 March 1990, reviewed and approved on 18 May 1990, by the New York General Service Classification Appeals and Review Committee (NYGSCARC). The decision rejected the Applicant's classification appeal and found that her post was properly classified at the G-6 level. The Applicant claims that her post should be classified at the P-2 level, effective 1 January 1985. The upgrading to the Professional level should be in accordance with information circular ST/IC/86/27. The Applicant also asks the Tribunal to determine that the NYGSCARC proceedings violated the Staff Regulations and Rules governing Joint Appeals Boards, that the Administration misled the Applicant's department with regard to the opportunity to classify the Applicant's post at the Professional level, that the classification audit described in administrative instruction ST/AI/301 was not applied to the Applicant and to find that various alleged improprieties, including delay, have damaged her and entitle her to compensation.

II. The Tribunal finds no need for oral proceedings in this case and rejects that plea.

III. The issues in this case are similar to those presented to the Tribunal in Judgement No. 541, Ibarria (1991). In Ibarria, the Tribunal recalled its jurisprudence in Judgement No. 396, Waldegrave (1987), in paragraph XV of which the Tribunal held:

> "It is not the function of the Tribunal to substitute its judgement for that of the Secretary-General in job classification matters. This would be so even if the Tribunal had the required expertise in this area - which it does not. For the most part, the arguments advanced on behalf of the Applicant seek to have the Tribunal determine independently how it would classify the post in question, but this is not the role of the Tribunal. It is instead the function of the Tribunal to determine whether, under all the circumstances, the Respondent has acted within his reasonable discretion..."

The same principles govern this case. The Applicant's contentions are aimed largely at persuading the Tribunal that the content of the Applicant's post is such that it should be classified at the Professional level. As indicated above, however, the Tribunal will not enter into an evaluation of the elements of the Applicant's job description.

IV. For the reasons set forth in paragraph III above, the Tribunal makes no determination as to whether the Applicant's substantive contention that the proper classification of her post should be at the Professional level, is meritorious. That is for the Respondent to determine in the exercise of his reasonable discretion, based upon such appropriate analysis and advice from NYGSCARC as he may wish to rely upon. In rendering such advice, NYGSCARC must, of course, ensure that it has taken into account and considered fairly the views of the Applicant and of knowledgeable officials in her department, though NYGSCARC is not bound by those views. Proper classification of a post should be in accordance with applicable ICSC standards and should be based on a reasonable evaluation of the factual content of a post as set forth in its description.

V. As in Ibarria, the Tribunal's concern is with matters such as a denial of due process, if the staff member neither sees nor has an opportunity to comment on documentation sent by the Service in charge of classification to NYGSCARC. In this case, that

concern is brought into even sharper focus by a letter dated 16 June 1987, from the Chief of the Administrative Review Unit, assuring the Applicant that when her case was submitted to NYGSCARC, she would "be given the opportunity to present any material that may be relevant." This assurance does not appear to have been fully honoured.

VI. It does not appear that a significant memorandum dated 20 July 1989, submitted by the Deputy Chief, Compensation and Classification Service to NYGSCARC, on which NYGSCARC relied in its recommendation to the Respondent, was made available to the Applicant. She, therefore, had no opportunity to submit material she deemed relevant with regard to that memorandum. The Tribunal directed that the memorandum be made available to the Applicant and she has submitted a memorandum dated 9 November 1992, with respect to it. The Applicant also previously sought to have presented for consideration by NYGSCARC a memorandum dated 30 April 1990, from the Deputy Director, Division for Decolonization and Trusteeship, SPQRCDT. As to the latter communication, the Applicant was advised that it had been received too late to be considered by NYGSCARC, despite the fact that NYGSCARC did not review and approve its 1 March 1990 recommendation with respect to the Applicant's classification appeal, until 18 May 1990.

VII. It appears that some possibly material information, which was not previously before NYGSCARC is contained in the Applicant's 9 November 1992 memorandum. The same is true of the other material that the Applicant believes relevant to proper classification of her post. Accordingly, the Tribunal finds that this case should be remanded to the Respondent. He should arrange for consideration by NYGSCARC of relevant material submitted to the Tribunal by the Applicant in her memorandum dated 30 June 1992, in her memorandum and that of the Senior Political Affairs Officer, SPQRCDT, dated 19 October 1992 and of relevant material submitted with her memorandum to the Tribunal dated 9 November 1992. In addition,

NYGSCARC should take into account, to the extent relevant, the 30 April 1990 memorandum referred to above. Also, it should take into account relevant information contained in the Applicant's application to the Tribunal dated 28 March 1991, and in her written observations on the Respondent's answer.

VIII. NYGSCARC is, of course, free to seek such further relevant analysis, information and advice as it wishes from the Compensation and Classification Service or the Administration. The Administration is certainly entitled to submit its views. The Applicant should, of course, be given the opportunity to comment on those views. The Tribunal reiterates that NYGSCARC is not required by the Tribunal's Judgement to accept or reject any or all of the Applicant's substantive contentions. The reasons for NYGSCARC's conclusions and recommendations should be explained clearly.

IX. The Applicant asserts that a Special Post Allowance (SPA) received by her at the Professional level confirms her contention that her post is at the Professional level and should be so classified. The Respondent has submitted to the Tribunal a memorandum dated 1 November 1992, from the Chief, Staff Administration and Monitoring Services, together with certain attachments, claiming that the two posts involved were different. In any event, a factual issue is raised by the Applicant's contention with respect to the SPA - namely, whether the description of her G-6 post and the work she was doing pursuant to that description was identical to the professional level post for which she received the SPA. That is a matter to be inquired into and addressed by NYGSCARC, on the basis of such information as it may wish to receive from the Administration, and of such comments thereon as the Applicant may wish to submit.

X. The Tribunal notes that one of the Applicant's contentions relates to a job classification audit. As the Tribunal found in Ibarria, the Classification Service has discretion as to whether to

conduct an audit in any particular case. If it wishes to do so, it may. But, if it decides against conducting an audit because it does not deem it necessary, that decision will provide no basis for a claim by the Applicant.

XI. The Tribunal notes that this appeal is before it on the basis of a reply by the Respondent to a request by the Applicant for a direct appeal contained in a communication to the Tribunal dated 27 September 1990. In that communication, a belief was expressed by the Respondent that NYGSCARC stood in the same position as a Joint Appeals Board, insofar as the jurisdiction of the Tribunal is concerned. That precise question has not previously been decided, and need not be decided in this case in view of the additional statement in that communication that: "Alternatively, the Secretary-General would agree to the direct submission of [the Applicant's] application to the Administrative Tribunal."

There are, as has been pointed out by the Applicant, some meaningful differences between NYGSCARC and a Joint Appeals Board. In Ibarria, the Tribunal expressed concern at NYGSCARC's procedure, but found that, with the modification discussed in paragraph VIII of that judgement, it met minimal due process requirements. The Tribunal believes that, if the Respondent wishes to retain a specialized body such as NYGSCARC, which, in advising the Respondent, appears to rely heavily on the views of the Compensation and Classification Service, it would be appropriate for that body to approximate, - in what is essentially an adversarial proceeding - more closely the procedures of the Joint Appeals Board. This would ensure a comparable level of transparency and observance of due process. In the Tribunal's opinion, this ought to lead not only to better informed decisions but would avoid or lessen the delays and need for remand arising from procedural problems.

XII. With the exception of delay resulting from the need for a remand, the Tribunal, at this stage, does not consider that there is any basis for an award of compensation, as claimed by the Applicant in her pleas.

XIII. In view of the foregoing, the Tribunal orders that:

(a) The case be remanded as set forth above;

(b) The Applicant be paid three months' of her current net base salary as compensation for the delay resulting from the need for a remand;

(c) All other pleas are rejected.

(Signatures)

Jerome ACKERMAN
President

Luis de POSADAS MONTERO
Vice-President

Hubert THIERRY
Member

Geneva, 29 June 1993

R. Maria VICIEN-MILBURN
Executive Secretary